FILE COPY

Office Supreme Court,
FILED
OCT 20 1933
CHARLES ELMORE CRO
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 65.

LILY CLAPIER,

Petitioner,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

PETITIONER'S BRIEF.

DAVID M. PALLEY,
of New York, N. Y.,

CHARLES H. SACHS,
LOUIS CAPLAN,
of Pittsburgh, Pa.,
of Counsel.

SUBJECT INDEX.

	PAGES
Opinions of the Courts Below	1
Jurisdiction	2
Statement of the Case	2
Specification of Errors	12
Argument	12
Conclusion	12

TABLE OF CASES CITED.

Arzt & Ramsey v. Flershem, et al., 64 F. (2d) 847, No. 64 on the calendar of this Court	2, 11, 12
Clapier v. Flershem, et al., 64 F. (2d) 847	1

TABLE OF STATUTES, ETC., CITED.

Constitution of the United States, Article V of the Amendments	3, 12
U. S. Judicial Code, Sec. 240-A	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 65.

LILY CLAPIER,

Petitioner,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, et al., etc.

PETITIONER'S BRIEF.

This case comes to this Court on a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Third Circuit, entered on March 24th, 1933, affirming a decree of the United States District Court for the Western District of Pennsylvania, dated May 31st, 1932 (R., 53), made by Judge Gibson dismissing the petitioner's bill on the ground that it does not state facts constituting a cause of action and is without equity.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 64 F. (2d) 847. The opinion of Judge Gibson is not reported but appears in the record at page 51.

Jurisdiction.

The decree of the United States Circuit Court of Appeals was entered in the office of the Clerk of the United States Circuit Court of Appeals for the Third Circuit on March 24th, 1933 (R., 69).

Jurisdiction to review this case is found in the provisions of Section 240-A of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. 347.

Statement of the Case.

This is a companion case of Arzt and Ramsey, Petitioners, v. Rudolph B. Flershem, et al., No. 64, upon the calendar of this Court.

At the very threshold of the receivership, the petitioner by a bill in the nature of a bill of review, challenged the jurisdiction of the District Court and impugned its right to seize the assets and appoint receivers of the National Radiator Corporation in the cause brought by the respondents, Rudolph B. Flershem, et al., against that company (hereinafter referred to as the "primary cause").

The primary cause was not brought on the ground that the defendant corporation was insolvent or in imminence of insolvency. Although the bill declares that intervention by the court was necessary to prevent "a multiplicity of suits, a race of diligence, wasteful strife and controversy" (R., 11), it is apparent from a perusal of that bill and the exhibits annexed thereto *that on October 9th, 1931, the National Radiator Corporation was solvent and amply able to pay in full, in cash, every debt as it matured in regular course.* It is also apparent that jurisdiction was invoked solely for the purpose of effectuating a reorganization of the company in order to scale its funded

debt and to coerce non-assenting debentureholders into subjection to the plan or else to wipe them out.

On October 9th, 1931, the District Court, upon the bill of complaint of the respondents, Flershem, et al. (R., 6), and the answer (R., 44) of the respondent, National Radiator Corporation, appointed Robert S. Waters and William G. Heiner receivers of said company (R., 46) and enjoined creditors from enforcing their claims against said company (R., 48).

On December 11th, 1931 (R., 2), the petitioner who is the owner of $11,000.00 principal amount of the company's debentures (R., 2) and was not a party to that cause, filed a bill in the nature of a bill of review, in which she prayed that the decree in the primary cause be vacated and the bill dismissed *on the ground that it is apparent upon the face of that bill* that the court did not have jurisdiction of the subject matter of the cause and that no cause of action for equitable relief or cognizable by a court of equity was set forth; that the suit was instituted to hinder, delay and defraud non-assenting debentureholders; and that the exercise of jurisdiction was in violation of the due process clause of the Fifth Amendment of the Constitution of the United States (R., 3-5).

The bill of complaint in that cause and the exhibits thereto annexed disclose the following facts.

The National Radiator Corporation, a Delaware corporation (R., 6), was engaged in the business of manufacturing and selling heating appliances, boilers and radiators (R., 8). It was formed in August, 1927, by a merger of six companies (R., 31), and on December 31st, 1930, it had outstanding 58,646 shares of $7.00 cumulative preferred stock, of no par value, and 272,708 shares of common stock, also of no par value, which at that time were carried on the books at $8,134,643.01 (R., 33).

On or about August 30th, 1927, the company authorized an issue of $16,000,000.00 principal amount, 6½%,

Sinking Fund Gold Debentures (R., 7), and pursuant to that authority, there was issued $12,000,000.00 of said debentures which, on October 9th, 1931, had been reduced to $10,705,000.00 (R., 8). The debentures mature August 1st, 1947, bear interest at the rate of 6½% per annum, payable semi-annually on the first days of February and August in each year (R., 7). The terms and provisions governing their issue and the appurtenant interest coupons, as well as the rights and remedies of the holders, are set forth in an Indenture (R., 7) (Schedule A, annexed to the bill, R., 14-31) made and executed between the National Radiator Corporation and the Bankers Trust Company, a New York corporation, as Trustee (R., 7).

On February 1st, 1931, the National Radiator Corporation refused to pay the installment of interest which then became due on its outstanding debentures (R., 8; 31).

The refusal to pay was not because of lack of funds.

On February 1st, 1931, the National Radiator Corporation was solvent and liquid and able to discharge in full, in cash, every obligation then due and payable. In the Plan and Agreement (Schedule B, annexed to the bill, R., 31-43) is a financial statement of the company's condition as of December 31st, 1930, just one month before (R., 32-33). It discloses that on that day the company had a net worth of $8,134,643.01; its assets were $19,434,548.08; its liabilities, including the outstanding debentures, were $11,299,905.07.

Especially noteworthy and impressive is the statement of its current assets and current liabilities. On December 31st the quick current assets of the company were $5,054,007.30 and of that $1,701,899.94 was in cash (R., 32). Its current liabilities at that time were $491,895.72 (*only $46,787.60 was presently due,* R., 33) and included therein was $293,339.58 accrued interest upon its outstanding debentures computed to December 31st, 1930. **The ratio of cash to current liabilities was more than**

3½ to 1. The ratio of current assets to current liabilities was more than 10 to 1.

It is therefore apparent that on February 1st, 1931 the company could have paid all its current debts including the interest on the debentures out of cash alone and there would still have remained in cash $1,200,000.00, and none of the other current assets would have been affected.

The company was manifestly solvent and liquid. Its refusal to pay the interest upon the outstanding debentures was unconscionable.

The explanation given by the company's management for the refusal to pay the interest on February 1st, 1931, is that the cash was needed as working capital for an anticipated increase of business; for the carrying of larger inventories; and for the purchase of new machinery and equipment, in order to maintain the corporation's competitive position in the industry (R., 34). A further explanation was that the outlook for the immediate future was obscure (R., 34).

Not only was the payment of interest omitted, but for the reasons given the company had decided to reorganize in order to scale its funded debt and thus drastically reduce its fixed charges (R., 8; 34).

On February 11th, 1931, ten days after the default, a reorganization committee appointed by the company (R., 34) promulgated a plan of reorganization (R., 8) and appointed the Bankers Trust Company, the Trustee of the debentures, depositary under the plan (R., 9; 40). This committee inaugurated by and acting in behalf of the company, purports to represent debentureholders, preferred stockholders and common stockholders (R., 31; 40).

The plan, however, is all in the interest of the company, discriminates between debentureholders and other creditors of equal rank, contains no provision for any

new capital and makes no provision for non-assenting debentureholders.

The plan contemplates the organization of a new corporation to which are to be transferred all the assets of the old corporation (R., 35). The capital structure of the new corporation is to be as follows (R., 36):

	Authorized	*To Be Presently Outstanding*
15-Year 5% Debentures	$5,500,000	$5,358,000
$7 Preferred Stock (no par value)	55,000 shares	53,580 shares
Common Stock (no par value)	400,000 shares	272,966 shares

The new debentures bear interest at the rate of 5% per annum which, however, is payable only out of income (R., 37).

Merchandise and service creditors are to be paid in full by the new company unless they shall have been previously paid by the old (R., 36).

Debentureholders, however, are to receive for each $1,000.00 principal amount of old debentures $500.00 principal amount of new debentures, 5 shares of new preferred stock and 20 shares of new common stock (R., 39).

The holders of present preferred stock are to receive, share for share, common stock of the new corporation. Holders of the present common stock are to receive stock warrants of the new company in the ratio of 1 to 3, namely, one stock warrant of the new company for each three shares of the old, upon payment to the Reorganization Committee of $1.00 for each warrant issued (R., 39). Holders of the warrants are entitled to purchase,

on or before July 1st, 1941, shares of common stock in the new company upon payment of $20.00 per share (R., 39).

Although the preferred stock is issued without par value, the holders of such stock upon involuntary liquidation are entitled to $100.00 a share, and on voluntary liquidation to $115.00 a share, thus placing the value of $100.00 a share upon said stock (R., 38).

The common stock is also without par value but the valuation placed on that stock in the scheme of reorganization is $20.00 per share, the price at which it may be purchased, by the holders of warrants, on or before July 1st, 1941 (R., 39).

Giving effect, therefore, to the valuations placed on the securities to be issued, the capital of the reorganized corporation is $16,175,320.00, which is made up as follows:

15-Year 5% Debentures	$ 5,358,000.00
$7 Preferred stock no par value at $100.00 per share	5,358,000.00
272,966 shares at $20.00	5,459,320.00
Total	$16,175,320.00

On August 1st, 1931, the company also refused to pay the installment of interest which then became due upon the outstanding debentures (R., 9). A large number of debentureholders refused to assent to the plan, demanded payment of their interest and threatened suit when such payment was refused (R., 11). Thereupon, the bill in the primary cause was filed by the Reorganization Committee; the National Radiator Corporation appeared and consented to the decree (R., 44), and the decree appointing receivers and enjoining creditors was entered (R., 46).

There is no allegation anywhere in that bill or in the answer that the corporation was then unable to pay its debts as they matured in regular course; nor is there any allegation that the company was insolvent or in imminence of insolvency.

There is nothing in the record to show that on October 9th, 1931, the financial condition of the company was substantially different from what it had been on February 1st, 1931. The only statement of the company's financial condition submitted to the court, at the time of the making of the decree, was the statement of December 31st, 1930 (R., 32-33), which is contained in the Plan and Agreement annexed to the bill of complaint, and in the absence of proof to the contrary, the only inference that can be drawn is that it substantially represents the condition of the company at the time that it was submitted.

It was apparent to the court, at the time of the making of the decree, that the National Radiator Corporation was not insolvent or in imminence of insolvency. The principal of the debentures was not due until August 1st, 1947, sixteen years later; and the corporation had ample funds with which to pay and discharge in full, in cash, all its debts presently due and payable, including the arrears of interest upon the debentures.

Nor is there any pretense on the part of the respondents that the company was insolvent or in imminence of insolvency. **The objection was only to the payment of the accrued interest upon the debentures** (R., 10), **but not to the payment of the other debts of the corporation which were to be assumed by the new company if not previously paid by the old** (R., 36). The respondents implicitly concede the solvency of the corporation.

The Circuit Court of Appeals in its opinion, per Woolley, C. J., says (R., 62):

"Concededly, the corporation was solvent in the sense of having fluid assets enough to pay its debts then due in the usual course of trade—without giving thought to the consequences. * * *"

The interposition of a court of equity was asked not on the ground of insolvency, present or imminent, but because (R., 10):

"The defendant has no means at hand with which to *meet, pay or satisfy the interest charges on the Debentures* overdue as aforesaid, without seriously *jeopardizing* the ability of the defendant to continue its business and without making it *difficult or impossible* for the defendant to secure necessary supplies, materials and labor to continue the operation of its plants and the sale of its products. * * *" (Italics ours.)

The suit was instituted because (R., 11):

"Certain holders of the Debentures not deposited with the complainants have threatened to bring suits in respect of interest due on their coupons and may levy execution upon the property of the defendant. * * *"

The parties to that cause thus expressly admit that the suit was instituted to prevent creditors who refused to assent to the plan of reorganization, from collecting the interest upon their debentures (R., 11) and to coerce them into subjection to the plan or else to wipe them out.

The complainants sue as creditors for the sum of $567,840.00 (R., 9-10), the unpaid interest upon the bonds deposited with them. But, although it is apparent that the company could, out of the funds in its possession,

pay all creditors whose debts had matured, including themselves, they do not demand judgment upon which they could levy execution. Instead, without explaining how it would come to pass, they aver that (R., 11):

> "* * * An attempt by the complainants to enforce their claim as a general creditor would precipitate immediate action on the part of other creditors of the defendant in different courts, and, unless this Court will take jurisdiction in this cause for the protection of every interest in the property and assets of the defendant, the result will be a multiplicity of suits, a race of diligence, wasteful strife and controversy; attempts will be made to obtain judgments and priorities; levies will be made upon the working capital, materials and supplies indispensable to the operation of the business of the defendant and this will result in the dismantling and dismemberment of its properties and *will greatly interfere with and ultimately* prevent the defendant from continuing to operate its properties, *and will result in dissipating the administrative, technical and sales forces of the defendant, which cannot be reassembled without great cost, and in destroying the confidence of the customers of the defendant and the cancellation of many orders now on its books.* * * *" (Italics ours.)

In their prayer for relief they ask (R., 12-14):

> 1. That the court ascertain and determine the rights of the complainants and other creditors of the National Radiator Corporation.
>
> 2. That the court take jurisdiction of its assets and property.

3. That receivers be appointed.

4. That the property, assets and business of the corporation be sold as an entirety and the proceeds distributed.

5. That all creditors of the company be enjoined from interfering with its assets and property.

6. The usual prayer for other and further relief and for subpoena.

The reason for all this is quite clear.

The Indenture expressly provides that in the event of a sale by the company of its property as an entirety, the obligations of the debentures shall be assumed by the new company (R., 29-31). It is therefore obvious that the suit was instituted to compass the transfer of the property and business of the National Radiator Corporation free from those obligations. As stated by Judge Gibson in his opinion (R. 52):

> "* * * The bill was specifically stated to be for the purpose of bringing about a reorganization of the defendant company. * * *"

We have thus set forth, briefly, the state of the record in the primary cause at the time of the filing of the petitioner's bill.

The appeal in this cause was heard by the Circuit Court of Appeals for the Third Circuit at the same time as the appeals from decrees in the primary cause and the Circuit Court of Appeals rendered a single opinion, per Woolley, C. J. (R., 59).

The grounds upon which the exercise of jurisdiction by the District Court was sustained have been fully discussed by us in the case of Arzt and Ramsey, Petitioners, v. Flershem, et al., No. 64.

Specification of Errors.

The petitioner relies upon the Specification of Errors set forth in the brief submitted in support of the Petition for the Writ of Certiorari, which are as follows:

1. The Circuit Court of Appeals erred in not reversing the decree of the District Court, dated May 31st, 1932, and in not vacating the decree and dismissing the bill of complaint in the primary cause as to the petitioner and all other creditors who did not assent to the plan of reorganization.

2. The Circuit Court of Appeals erred in holding that the jurisdiction over the subject matter in the primary cause existed and was properly exercised.

3. The Circuit Court of Appeals erred in holding that the exercise of jurisdiction in the primary cause did not constitute a taking of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

Argument.

Since in this case we challenge the jurisdiction of the court in the primary cause upon the same grounds as those set forth in the companion case of Arzt and Ramsey, Petitioners, v. Flershem, et al., No. 64, now also before this Court, we shall, to save repetition, rest upon the arguments submitted by us in that case, to which we respectfully refer this Court.

Conclusion.

For the reasons therein stated, we respectfully submit that the decrees of the Circuit Court of Appeals and

the District Court in this cause should be reversed and adjudged void as to all creditors who have not assented to the plan of reorganization.

Respectfully submitted,

DAVID M. PALLEY,
of New York, N. Y.,

CHARLES H. SACHS,
LOUIS CAPLAN,
of Pittsburgh, Pa.,
of Counsel.